BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LARRY WADE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,054,674
HACKNEY & SONS (MIDWEST) INC.	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL FIRE INSURANCE	)	
COMPANY and AMERICAN ZURICH	)	
INSURANCE COMPANY	)	
Insurance Carriers	)	

ORDER

Claimant requests review of the March 7, 2012, preliminary hearing Order of Administrative Law Judge Thomas Klein (ALJ).

Claimant appeared by his attorney, Roger A. Riedmiller of Wichita, Kansas. Respondent and its insurance carrier Liberty Mutual Fire Insurance Company appeared by their attorney, John M. Graham, Jr., of Kansas City, Missouri. Respondent and its insurance carrier American Zurich Insurance Company appeared by their attorney, Kendra M. Oakes, of Kansas City, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held June 2, 2011, with exhibits and the transcript of Preliminary Hearing held March 6, 2012, with exhibits, and the documents filed of record in this matter.

ISSUES

Claimant requests the ALJ reconsider the earlier decision which found that he failed to provide timely notice of his accident under K.S.A. 44-508(f). Claimant contends the date of accident determination by both the ALJ and Board Member Gary Korte were incorrect under K.S.A. 2010 Supp. 44-508(f). Therefore, the determination that notice was not timely given was also incorrect. The ALJ declined to modify his previous order regarding the date of accident.

The claimant requests review of the following:

1. Whether the ALJ exceeded his jurisdiction by the ignoring the clear and plain language of K.S.A. 44-508(d) with respect to the date of accident;

2. Whether notice and timely written claim have been established by claimant as proper and within the timeliness of the Workers Compensation Act; and

3. Whether claimant has the burden to disprove that he received written documentation of an injury and failed to properly report it in a timely fashion.

Respondent argues that the ALJ's Order should be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant worked for respondent for 34 years, in its paint shop. Around 2003, claimant began experiencing difficulties with his knees. He was not sure what was causing the knee pain, but he noted that he crawled around on his knees at work and would hit nuts and bolts with his knees. Claimant testified that when he got to where he could not walk, he decided to go to a doctor. Claimant's job with respondent would require that he be on his knees two to four hours a day, five to six days per week. Claimant worked up to ten hours per day.

On October 21, 2003, claimant underwent surgery on his right knee involving a partial medial meniscectomy, chondroplasty and bone spur removal under the hands of Dr. Scott Cochran. Dr. Cochran's office note of November 4, 2003, stated that claimant's job involved climbing and crawling around on his knees. He did state that this was not a workers compensation issue, although what prompted that comment is not clear in this record. Claimant was off work until February 2004. Claimant never submitted any type of paperwork to respondent contending that his knee problems were related to his job with respondent. He would, periodically, take a doctor's slip to respondent when he had to be off work.

When claimant returned to work, performing his regular duties, he experienced other conditions, including swelling in his legs and cellulitis. Claimant testified that he believed that his leg swelling was related to his work at respondent. But, whenever he would miss work, he would use vacation time. When he ran out of vacation time, he would apply for FMLA. Claimant didn't tell respondent that his bilateral knee condition was related to his job until he submitted the written claim letter on February 22, 2011.

Claimant's right knee condition continued to worsen to the point he underwent a total knee replacement under the care of William L. Dillon, M.D., on November 15, 2010. Dr. Dillon, in his report of that date, states that claimant's right knee has been aggravated by the weight-bearing activities, including squatting and walking, which he does frequently at his job. Claimant acknowledged that he had seen this report. Claimant also acknowledged that he was given written restrictions from Dr. Dillon prohibiting kneeling and crawling at work which he would take to respondent. He was also taken off work occasionally. Claimant agreed that Dr. Dillon advised him that his job was making his condition worse. Claimant returned to work for respondent in March 2011, with restrictions, including no squatting, no crawling, no kneeling and no prolonged standing or walking. However, respondent was unable to meet the restrictions and claimant lost his job. His last day with respondent was approximately March 15, 2011.

On February 22, 2011, claimant, with the assistance of his attorney, submitted a written claim alleging a series of accidental injuries to his knees bilaterally,[1] beginning in 2004 and extending to November 12, 2010. The Form K-WC E-1 Application For Hearing (E-1) filed with the Kansas Division of Workers Compensation on February 18, 2011, claims a date of accident from "2004 and/or each day worked thereafter and/or 11-12-10 and/or day of written claim submitted".

Claimant was referred by his attorney to board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., on April 18, 2011. Dr. Murati diagnosed claimant with status post right knee arthroscopy, right total knee replacement and left patellofemoral syndrome secondary to overuse. He opined that claimant's current diagnoses are within all reasonable medical probability a direct result of claimant's work-related injury which was sustained in "2004 and each and every working day through 11-12-10 and/or day of written claim submitted" while working for respondent.[2]

In a letter dated January 18, 2012, Dr. Dillon advised that neither he nor his staff provided anything in writing to claimant regarding whether claimant's condition was work related or due to his work activities. However, in the office note from Dr. Dillon signed by Dr. Dillon on November 15, 2010, the report states "The patient was given a list of indications and different treatment options".[3] Claimant acknowledged at the June 2, 2011, preliminary hearing that he had received this medical record. The exact date that he received the report is not clear in this record. But, the November 15, 2010, report indicates that claimant had already been provided "indications". The term "indications" is not defined in this record and the January 18, 2012, letter from Dr. Dillon does not explain what is

---

[1] In the written claim, it does not say what part (or parts) of the body was injured, but the February 18, 2011, cover letter does say "right and left knees." (See P.H. Trans., Cl. Ex. 4.)

[2] P.H. Trans. (Jun. 2, 2011), Cl. Ex. 3 at 6 (April 18, 2011, report of Dr. Murati).

[3] *Id.*, Resp. Ex. 2; P.H. Trans. (Mar. 6, 2012), Cl. Ex. 1 at 3.

meant by indications. But it appears that claimant was provided several writings from Dr. Dillon. And the writings provided indications regarding his condition and the necessary treatment options as well as restrictions from specific activities at his job with respondent. Activities which Dr. Dillon stated were making his right knee injury worse.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[4]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[5]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[6]

> (d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this

---

[4] K.S.A. 2010 Supp. 44-501 and K.S.A. 2010 Supp. 44-508(g).

[5] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[6] K.S.A. 2010 Supp. 44-501(a).

> subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[7]

During the almost eight years claimant suffered injuries to his right knee and also his left knee while working for respondent, he never once claimed the injuries as work related until he submitted the attorney letter of February 22, 2011. By that time, claimant had undergone right knee surgery and a total right knee replacement. Pursuant to K.S.A. 2010 Supp. 44-508(d), claimant was never treated by an authorized doctor for a work-related accident. Therefore, the first two criteria of K.S.A. 2010 Supp. 44-508(d) have not been met. The date of accident must then be determined by either finding a date upon which written notice is provided (in this case, February 22, 2011) or the date the condition is diagnosed as work-related, provided such fact is communicated in writing to the injured worker, whichever is the earliest. Here, claimant was provided written restrictions on more than one occasion, prior to his surgery, limiting his work duties, which Dr. Dillon had told claimant were causing claimant's right knee injury to worsen. Also, claimant was advised in the November 15, 2010 writing that his condition was aggravated by his work activities including squatting and walking "which he does frequently at his job".[8] Claimant acknowledged that he had indeed seen this report before.[9] The report contains specific language detailing the information provided to claimant in a list, which indicates a writing of some type. Therefore, the diagnosis was made on November 15, 2010, several months prior to the submission of the written claim by claimant's attorney. And this diagnosis was then presented to claimant in the form of a writing. The date of accident in this matter would be November 15, 2010.

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.[10]

K.S.A. 44-520 goes on to say:

> The ten-day notice provision provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident . . . .[11]

---

[7] K.S.A. 2010 Supp. 44-508(d).

[8] P.H. Trans. (Jun. 2, 2011), Resp. Ex. 2 (Nov. 15, 2010 report of Dr. Dillon).

[9] *Id.* at 55.

[10] K.S.A. 44-520.

[11] *Id.*

Claimant submitted his written claim in this matter on February 22, 2011. That was the first time that a claim for a workers compensation accident was made by claimant. This is the first time claimant asserted that his ongoing knee problems were related to his job. The ALJ, in his original Order of June 2, 2011, determined that claimant had failed to provide timely notice to respondent of the accident based upon a finding of a date of accident of November 15, 2010.

In his Order of March 7, 2012, the ALJ declined to change his previous order and find a different date of accident. This Board Member agrees. Claimant's notice on February 22, 2011, is more than 10 days and more than 75 days after the November 15, 2010, date of accident. Claimant's request for workers compensation benefits must be denied. The March 7, 2012, Order of the ALJ is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant failed to provide timely notice of his alleged accident pursuant to K.S.A. 2010 Supp. 44-508(d) and K.S.A. 44-520. The denial of benefits in this matter is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Thomas Klein dated March 7, 2012, should be, and is hereby, affirmed.

[12] K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of May, 2012.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
firm@raresq.com

John M. Graham, Jr., Attorney for Respondent and Liberty Mutual Fire Ins. Co.
KansasCityLegal@libertymutual.com

Kendra M. Oakes, Attorney for Respondent and American Zurich Ins. Co.
koakes@mvplaw.com

Thomas Klein, Administrative Law Judge